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No. 04-872

In The Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oregon

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JAY LAWRENCE FRIEDHEIM
Attorney
820 Mililani Street
Suite 503
Honolulu, HI 96813
(808) 545-5454 voice
(808) 528-1818 fax
jlf@pixi.com

Counsel of Record

DANIEL W. MEEK
Attorney
10949 S.W. 4th Avenue
Suite 1000
Portland, OR 97219
(503) 293-9021 voice
(503) 293-9099 fax
dan@meek.net

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. RESPONDENT DEPENDS HEAVILY ON TESTIMONY OF AN EMPLOYEE FOUND TO BE INCONSISTENT BY THE TRIAL COURT.

Respondent Bill Bradbury's Brief in Opposition [hereinafter "Respondent"], pp. 1-5, consists largely of quotations and paraphrases of the Second Affidavit of John Lindback, an employee of Respondent. This affidavit was submitted within minutes before trial commenced. The trial court (App. 38-39) found that this affidavit was inconsistent with his testimony at trial:

> No written rule, however, justifies these additional requirements, although Mr. Lindback asserts that this reflects his office's longstanding historical practice.
>
> Mr. Lindback's testimony at the hearing was not entirely consistent with his Second Affidavit submitted in this case. . . .
>
> These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

II. RESPONDENT'S BRIEF OFFERS SEVERAL INTERNAL CONTRADICTIONS AND FACTUAL ERRORS.

Respondent (p. 5) states: "The instructions directed the counties to screen and reject signature sheets that had circulator signature and date problems." But he also states (p. 4):

> Notably, the matter examined by county officials is extremely limited: They simply compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards.

Thus, Respondent states that the county officials review the sheets for "circulator signature and date problems" but then also states that the counties review only the elector (voter) signatures **only**. Both statements cannot be true. Respondent's defense depends upon maintaining these mutually exclusive statements.

Lindback's statements about accepting exemplars (p. 2), when in fact he didn't, were partly why the trial court found his testimony to be inconsistent. He was contradicted by the uncontested affidavits showing that he disqualified at least 457 verified voter signatures on sheets signed by the named circulators, only because their signatures "appeared to be initials," even though all of them submitted sworn affidavits showing that what "appeared to be initials" were in fact their normal signatures on important documents, such as drivers licenses and Social Security cards. SER 22, 373, 375, 395; Reply of Applications on Application for Stay of Oregon Supreme Court Order Pending Certiorari Review (Sept. 27, 2004), No. 04A242, p. 8. Nader was declared short by 218 signatures.

Respondent (p. 3) states he "has permitted corrections of a dating error by re-dating and re-signing" and (p. 4) that "when a date has been stricken and another written in, the sheet is accepted if their date would be proper." But Respondent (p. 7) states (in the "Unpublished Instructions") that sheets are to be disqualified if "Circulator date has been crossed out or modified." Again, both statements cannot be true. Either a modification to the circulator date disqualifies the sheet or it does not.

III. THE RECORD CLEARLY SHOWS THAT THE NADER CAMPAIGN HAD NO KNOWLEDGE OF THE UNWRITTEN RULES UNTIL THE PETITIONING EFFORT WAS NEAR ITS END.

Respondent (p. 7) claims, "The parties disputed whether petitioners were aware of the Secretary's rules and requirements," referring to the "Unpublished Instructions" Lindback sent to the counties. Respondent cites the Lindback Affidavit (Supp. App. 4), but Lindback states no time at which the

Nader campaign obtained the "Unpublished Instructions." He merely refers to the Affidavit of Travis Diskin, an employee of the Nader campaign. The Diskin Affidavit shows he obtained the "Unpublished Instructions" long after the bulk of the signatures had already been collected in a manner deemed defective by the "unwritten rules."

Diskin testified that he found out during the campaign that the counties had received a "new directive . . . requiring them to pull certain signature sheets from the submitted sheets before verifying elector signatures attached hereto as Exhibit A." SER-29 (attaching the "Unpublished Instructions" also at App 19). This created "gaps" in the required sequential numbering for the sheets. He phoned the responsible employee of Respondent to find out what to do. His contemporaneous handwritten notes (SER-32) state that this call was on August 10, 2004 (a date confirmed by his handwritten notes on the "Unpublished Instructions," SER-33). As the final deadline was August 24, this was late into the petitioning process.

As indicated by Lindback (Supp. App. 6), he disqualified 2,292 signatures "solely for the reason that they were submitted unnumbered to the counties." Nowhere in the record does Respondent contest Diskin's statement that the submittal of unnumbered sheets commenced after his August 10 phone conversation. The record is that Nader submitted some 27,000 signatures to the counties and that Respondent accepted 15,088 of those signatures, while rejecting 718 for circulator "defects" and at least 2,292 for lack of sequential sheet numbering. Supp. App. 6-7. So the number of county-verified voter signatures filed with Respondent was at least 18,098. That means that the ones on the unnumbered sheets constituted at most only 13% of the signatures. That also shows that the switch to unnumbered sheets occurred very late in the campaign, after at least 87% of the signatures had been collected on numbered sheets. And there was no testimony that Respondent ever provided the "Unpublished Instructions" to anyone connected with the Nader campaign.

Respondent (p. 8) claims that Lindback met with Diskin on July 30, 2004, prior to writing the August 4 "Unpublished

Instructions." The only record of what he told Diskin is a "memo to file" by one of his assistants. When Diskin showed his contemporaneous notes of a conversation with a different assistant to Lindback (SER-32), however, the Oregon courts found that an insufficient basis for avoiding application of the agency's written rules on sequential numbering. App. 30. Yet, Respondent offers the proposition that he could create new, unwritten rules, as long as he claimed that one of his employees had a conversation about them (without ever providing them in writing) with one person connected with the Nader campaign. Again, Respondent's positions are inconsistent. Under either proposition, Nader would have qualified for the ballot. Either his campaign was entitled to the 2,354 signatures disqualified for lack of campaign-applied sequential numbers, or it was entitled to the 718 signatures disqualified pursuant to the "unwritten rules."

Respondent (p. 9) states that the trial court made no "express or implicit finding as to whether petitioners had received notice of the challenged rules and procedures before they submitted their signature sheets." To the contrary, the trial court stated that the Secretary was proceeding under "unwritten rules . . . not supported by the written administrative rules as set forth in the Manual" and "not applied either uniformly or consistently in actual practice." How could the Nader campaign have received notice that Respondent would inconsistently apply unwritten rules?

IV. RESPONDENT APPLIED UNWRITTEN RULES TO DISQUALIFY THE NADER PETITION SHEETS.

As shown in our Petition (p. 16), the unwritten rules applied by Lindback included rules (such as that the circulator's signature itself must be "legible") that were not even in the "Unpublished Instructions" and were written nowhere. The Oregon Supreme Court (App. 21) concluded:

> It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful.

As the trial court found, there were no **written rules** telling petitioners that circulator signatures must be "legible" and must not "appear to be initials." App. 38. There were

no written rules (apart from the "Unpublished Instructions") banning slips of the pen or other corrections to dates on circulator signatures. Yet, Respondent discarded 718 signatures because of these unwritten rules, with an untold additional number of voter signatures discarded at the county level at Respondent's direction that the counties would also apply the "unwritten rules."

Respondent (p. 13) incorrectly states that the Oregon Supreme Court "specifically rejected the trial court's theories that the signature and date review procedures that the Elections Director had followed in his office were unwritten rules." In fact, that Court expressly stated that the rules "were not themselves written, but that does not render them unlawful." App. 21. That Court never stated that the rules were written or were in any way provided to the petitioners prior to the collection of signatures. The Oregon Supreme Court referred to the "unwritten rules" as "review procedures," but it is clear that they were substantive requirements imposed upon the signature sheets.

Respondent (p. 14) claims that he "plausibly could interpret the requirement of a signature to mean that the circulator must sign his name in full, rather than simply use initials, and so instruct the county clerks." This sweeping assertion evokes that of the Chicago Board of Election Commissioners in *Briscoe v. Kusper*, 435 F.2d 1046, 1052-54 (7th Cir. 1970), which rejected as a violation of due process the Board's requirement that a "proper" signature must include a full legal name with middle initial.

Respondent (pp. 16, 25) offers another contradiction in noting the Oregon Supreme Court's conclusion that the Nader campaign had to follow the written rules pertaining to sequential numbering of signature sheets when submitted to the counties, despite having received oral instructions to the contrary from the appropriate employee in the Secretary of State's office. On that issue, Respondent argues that only the written rules can apply and cannot be modified by unwritten instructions from his employees. Yet, when it comes to the sheets disqualified for alleged problems with circulator signatures or dates, Respondent argues that the written

rules can be changed and supplanted by "Unpublished Instructions" sent to the counties and by completely unwritten rules, such as the "legibility" rule.

V. THIS CASE IS NOT MOOT.

Assertions of rights under the U.S. Constitution in election law cases are often litigated, despite the passing of the election, under the doctrine of "capable of repetition yet evading review." *Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); cases cited at Petition, p. 4. Respondent claims that Petitioners are "now" "aware of the Secretary's interpretation of elections law rules in the last presidential election." That is not a recognized basis for mootness. If it were, then this Court could never hear an election law case (or perhaps any case), because Petitioners will always be aware of the State's interpretations some months after they are applied, to Petitioners' prejudice.

That Respondent in April 2005 adopted rules pertaining to evaluation of circulator signatures and dates is irrelevant. Petitioners' claims focus on Respondent's application of unwritten rules to disqualify their signature sheets. **Respondent has never disavowed its claimed authority to disqualify such sheets for alleged "defects" that are nowhere mentioned in his published rules.** The Oregon Supreme Court expressly upheld his authority to impose such "unwritten rules" under Oregon law, which makes such imposition capable of repetition. Future independent candidates, petitioners, and circulators will know the new **written** rules but will not know whatever new "unwritten rules" the Secretary may devise. It is his authority to impose, retroactively, such "unwritten rules" that is our central complaint and risk to our rights under the U.S. Constitution.

Respondent's affidavits show his pattern of imposing unwritten rules upon petitioners. Respondent retroactively imposed unwritten rules also on initiative petitions, Supp. App. 30, which gave rise to *Sajo v. Bradbury*, No. 04-36034 (9th Cir.), which is in briefing now with a different set of facts and a different set of written rules. Respondent there argues that his application of unwritten rules to initiative campaigns earlier in 2004 is also moot.

Respondent is claiming some sort of "voluntary cessation" mootness.

> A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). A "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness.*" *Adarand Const., Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000). "Courts are not compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Friends of Earth, supra*; (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). In order to overcome the presumption against mootness, defendant must "satisfy the heavy burden of persuasion" that it will not resume the complained-of conduct. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). Adoption of new rules to partly codify the "unwritten rules" does not cause existing claims to be moot. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-662, 113 S.Ct. 2297, 2301 (1993).[1]

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[1] If it matters, Respondent's new written rules are not at all the same as the "Unpublished Instructions" he sent to county officials in August 2004 or the same as the additional "unwritten rules" he applied to the Nader sheets. Compare App. 18-19 with Supp. App. 52-57. New rules (2)(c), (2)(d), (2)(e), (2)(f), (2)(h), (2)(j), (2)(k), (2)(m), (2)(n), (2)(o), (2)(p), (4)(d), (5)(c), (6), and (7) are quite different. The new rules (Supp. App. 52) state they are "based on current office policy, and based on direction from the U.S. District Court." This refers to *Sajo v. Bradbury*, No. CV 04 853 PA (9th Cir. No.

(Continued on following page)

Respondent contends that his actions have not "evaded review," because this Court denied our Application for Stay, Pending Certiorari Review (September 24, 2004). A denial of a stay is not adjudication on the merits. Respondent at that time swore it was too late to reprint the ballots. Thus, his actions evaded review due to the schedule of the election.

VI. STATE IMPAIRMENT OF THE EXERCISE OF FRANCHISE RIGHTS REQUIRES A SHOWING THAT IT ACHIEVES AT LEAST AN IMPORTANT STATE INTEREST.

Respondent (p. 25) argues for weaker scrutiny "applicable to reasonable and nondiscriminatory procedural election regulations such as the ones at issue here." The unwritten rules at issue here were substantive, not procedural. They disqualified thousands of verified voter signatures for failure of the sheets to comply with substantive, albeit unwritten or undisclosed, requirements. Second, Respondent identified no reason that his unwritten or undisclosed rules were necessary "to operate elections fairly and efficiently." They fail any standard of scrutiny.

Respondent (p. 26) notes that strict scrutiny applies "where the content of the regulation itself places a 'severe restriction' on ballot access." This criterion is satisfied here, where the unwritten, undisclosed yet substantive rules applied by Respondent disqualified about half of the voter signatures collected in Oregon and certainly caused his absence from the ballot. Allowing a regime of unwritten and/or undisclosed rules, in the hands of an officeholder himself elected on a partisan basis, is tantamount to destruction of ballot access for independent candidates who might draw votes from the candidate of the Secretary of State's party.

04-36034). Plaintiffs lost that case in the District Court, and the District Court did not order Respondent to take any action.

Respondent refers to "discouraging fraud in the execution of signature sheets" but does not identify what fraud this policy somehow discourages. In Oregon, there are no qualifications for performing the task of petition circulator, other than being a human. How does requiring a "legible" signature, regardless of the presence of a legible printed name of the circulator on the next line down, in any way discourage fraud? What is the type of fraud it discourages?

Lindback's attempt (Respondent, p. 28) to justify the sequential numbering requirement makes no sense. The counties find duplicate signatures by notations in their voter registration databases, not by anything related to numbering of the sheets. And here the counties accepted the sheets without numbering, verified the voter signatures, and applied their own numbers before returning them to the campaign. It was Respondent who rejected them, after the counties had already verified 2,357 signatures on those sheets, without objection.

Lindback refers to "the possibility of fraud which may occur by tampering with the sheets after county verification." But his system does not at all prevent that. First, there appears to be no reason at all for the counties to give the signature sheets back to the petitioners instead of simply forwarding them to the Secretary of State. Second, because of Respondent's instructions to the counties to remove hundreds of sheets from the process for alleged defects in circulator signatures and/or dates, the sheets to be submitted by petitioners to the Secretary of State are not in sequence anyway. Respondent admits that the sequential numbering requirement applies to the sheets as they are submitted to the counties, not as they are submitted to Respondent.

Respondent offers the discussion from Jeannie Berg (Supp. App. 6-7) from an affidavit we believe was not part of the record below.[2] Her comments are circular or simply

[2] The motion to intervene by SEIU was not granted and the Berg affidavit therein proffered was not accepted by the trial court.

seek to justify the requirement that the circulator signature be dated. No one is challenging that requirement. We are challenging Respondent's practice of disqualifying sheets if that date was in any way corrected or other than a one-time, pristine flow of ink on paper. She also posits impossible scenarios about inter-campaign "discrediting." Lindback's reference to Kelly Highley has nothing to do with any of the requirements we are challenging.

VII. PETITIONERS' EQUAL PROTECTION CLAIMS WERE FULLY PRESENTED AND PRESERVED BELOW.

The Fifth Claim for Relief in our original filing (designated an "appeal" from agency action by Respondent) with the trial court specifically referred to the Fifth Amendment, wherein lies the Equal Protection Clause, and our Seventh Claim was couched in terms of discrimination, the hallmark of an equal protection claim.

Plaintiffs' Memorandum in Support of Motion for Injunctive Relief, filed with the original appeal, referred to "equal protection" four times and referred to the Fourteenth Amendment six times. It stated that Respondent's action "violated the rights of Plaintiffs . . . to the application of due process and equal protection of law under the Fifth Amendment, made applicable to state action by the Fourteenth Amendment."

Our Plaintiffs' Memorandum in Opposition [to Petition for Mandamus] to the Oregon Supreme Court reasserted all of the claims not reached by the trial court. It referred to equal protection twice and the Fourteenth Amendment four times. It included the same statement, quoted above, regarding "due process and equal protection of law." The Oregon Supreme Court lumped all of our claims under the U.S. Constitution together as "various constitutional challenges," not mentioning any specific amendment or clause, and summarily rejected them. App. 30-32.

Clearly, the equal protection issue was both raised and briefed at all stages below.

Respectfully submitted,

JAY LAWRENCE FRIEDHEIM
Attorney
820 Mililani Street
Suite 503
Honolulu, HI 96813
(808) 545-5454 voice
(808) 528-1818 fax
jlf@pixi.com

Counsel of Record

DANIEL W. MEEK
Attorney
10949 S.W. 4th Avenue
Suite 1000
Portland, OR 97219
(503) 293-9021 voice
(503) 293-9099 fax
dan@meek.net

Attorneys for Petitioners